THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE, et al., Plaintiffs, v. ANDREW WHEELER, et al., Defendants, and AMERICAN FARM BUREAU FEDERATION, et al., Intervenor-Defendants.	Case No. 2:15-cv-01342-JCC PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO CROSS-MOTION ORAL ARGUMENT REQUESTED

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

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(206) 343-7340

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INTRODUCTION

This case challenges an unlawful expansion of the so-called Waste Treatment System Exclusion, codified for the first time in 2015 without public notice or opportunity to comment. Defs. Cross Mot. and Opp., Dkt. 79 at 3-5. Defendants Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Agencies") admit that they refused to consider comments on the substance of that action, limiting public comment to "ministerial adjustments." *Id.* at 1, 17. The Agencies further admit that vacating their 2015 action will not stop the Agencies from relying on a 1980 un-promulgated Federal Register notice as the basis for applying the expanded exclusion. *Id*. These defects are fatal to the Agencies' 2015 adoption of the expanded Waste Treatment System Exclusion. Without an adequate remedy, not only will the challenged action lead to more destruction and pollution of "waters of the United States," it will also establish a precedent and a template for any federal agency to make end-runs around mandatory public participation requirements through the subterfuge of a temporary un-promulgated action. Plaintiffs therefore reiterate their request for declaratory and injunctive relief.

ARGUMENT

I. THE EXPANDED WASTE TREATMENT SYSTEM EXCLUSION IS UNLAWFUL.

The Agencies do not attempt to deny that their expansive interpretation of the Waste Treatment System Exclusion strips natural "waters of the United States" of Clean Water Act jurisdiction when those waters are used as part of a waste treatment system. Unlike the narrow version lawfully-promulgated in May 1980, the expanded exclusion codified in 2015 is irreconcilable with the Act's categorical prohibition against the discharge of pollutants into "waters of the United States" absent a permit demonstrating compliance with water quality standards and technology-based limits. 33 U.S.C. §§ 1311(a), 1342; Mot. S. J. at 7-8. It also

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(206) 343-7340

contravenes the Agencies' own finding that impounded "waters of the United States" remain under the protective jurisdiction of the Clean Water Act even after impounded. *Id.*

The Agencies and Intervenor-Defendants' arguments to the contrary attempt to stretch the Agencies' statutory authorities far beyond what is supported by the Act. While the Agencies have authority to *interpret* the scope of the term "waters of the United States," the authority to interpret does not include the authority to *remove* such waters from Clean Water Act jurisdiction so they can be pressed into service as waste dumps. They nonetheless argue that the expanded exclusion is permissible because companies seeking to use jurisdictional waters for that purpose must first obtain a Clean Water Act § 404 permit to impound a water and turn it into a "waste treatment system," as well as a § 402 permit to discharge polluted effluent *from* the newly-created waste pond into downstream waters. Dkt. 79 at 19-20; Dkt. 72 at 1-2. Congress provided sections 402 and 404 as specific and narrow exceptions to the blanket no-discharge rule; the possession of a permit for one activity in no way obviates other applicable permit requirements. The Agencies identify no language in the Clean Water Act that allows them to expand their authority in this manner, and even if they had identified a relevant statutory ambiguity (which they do not), their expanded interpretation of the exclusion is patently unreasonable.

II. ADOPTION OF THE EXPANDED WASTE TREATMENT SYSTEM EXCLUSION WAS A FINAL ACTION SUBJECT TO JUDICIAL REVIEW.

The Agencies seek to limit the Court's review in this case to certain "ministerial tweaks" adopted in the 2015 Rule, arguing that they did not "reopen" the exclusion as part of that rulemaking. Dkt. 79 at 12 (arguments regarding traceability), *id*. 15-16 (arguments regarding timeliness). Relatedly the Agencies argue that Plaintiffs' claims are untimely because the omission of narrower language is "not new to the 2015 rule." Dkt. 79 at 15-16. These arguments strenuously avoid the fact that the 2015 Rule permanently codified an expanded interpretation of

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the exclusion for the first time ever. *See* "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054, 37,056 (June 29, 2015). Before then, the only lawfully-promulgated version of the exclusion stated that it was limited to "manmade bodies of water" that "neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." Mot. S.J. at 5, citing 45 Fed. Reg. 33,290, 33,424 (May 19, 1980). Indeed, because EPA only ever purported to temporarily "suspend the effectiveness" of the limiting language in 1980, in a notice and not a public rulemaking, Dkt. 79 at 4, the Agencies could only permanently codify that alteration and the expanded interpretation of the exclusion through a full notice and comment rulemaking.

The Agencies undertook an affirmative decision and action to adopt the expanded exclusion in 2015, simultaneously lifting the suspension and suspending the same language. 80 Fed. Reg. at 37,114. They also made minor textual changes, renumbering paragraphs and deleting an obsolete cross-reference to ensure that the expanded exclusion would fit in with their newly-revised definition of "waters of the United States." And the Agencies affirmed – for the first time in a rulemaking process – a broad interpretation of the exclusion that extends even to systems built in jurisdictional waters. Final Rule, 80 Fed. Reg. at 37,097 (discussing waste treatment systems "built in a 'water of the United States'"). These actions "mark[ed] the 'consummation' of the agency's decisionmaking process." *See Bennett v. Spear*, 520 U.S. 154 (1997). And, because they codify both the language *and* the expanded interpretation of the exclusion for the first time, they are actions "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.*

The Agencies nonetheless argue that they did not "substantively reconsider the exclusion" and merely continued it "unchanged." Dkt. 79 at 6, 16. That implies that the

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Agencies in 2015 were acting upon a regulatory backdrop in which "the exclusion" had a settled definition as the *expanded* exclusion, minus the original limiting language. On the contrary, the Agencies had never promulgated that version or that interpretation of the exclusion. As both the Agencies and Intervenor-Defendants emphasize, the Agencies' interpretation of the same regulatory text has changed over time, even after the 1980 temporary suspension of the exclusion's original limiting language. Dkt. 79 at 20; Dkt. 72 at 6-7. In fact, as late as 1986, EPA's Office of Solid Waste continued to interpret the exclusion narrowly. *See* Decl. of Jennifer C. Chavez, Ex. B. at 6-7 (noting that "the preamble to the May 19, 1980 regulation suggest[s] that prior [Clean Water Act] regulations, like the [Clean Water Act] itself, were 'not intended to license dischargers to freely use waters of the U.S. as waste treatment systems'").

While the Agencies claim they did not intend to "address the substance" of the exclusion, *id.* at 16, the Agencies did address comments and take responsive action aimed at assuring regulated industry they were not narrowing the interpretation; they refused to consider comments aimed at restoring the original narrow scope of the exclusion. (*See id.* 6, 16-17). Yet both sets of comments related to the "substance" of the exclusion.

The decision to codify the expanded Waste Treatment System Exclusion for the first time not only required but actually entailed an affirmative agency action. The codification of the expanded exclusion was, by its very nature, a final action subject to judicial review. For the same reasons, Plaintiffs' complaint is timely because the 2015 Rule is well within the general statute of limitations under 28 U.S.C. § 2401.

In any event, federal courts have repeatedly held that certain actions are final agency actions subject to judicial review even though the actions maintained the status quo. *See, e.g.*, *City of Chicago v. United States*, 396 U.S. 162, 166 (1969); *Havasupai Tribe v. Provencio*, 906

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F.3d 1155, 1162 (9th Cir. 2018), *cert. denied*, 2019 WL 1331355 (U.S. May 20, 2019); *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 990 (9th Cir. 2006).

III. PLAINTIFFS HAVE STANDING TO CHALLENGE THE EXPANDED WASTE TREATMENT SYSTEM EXCLUSION.

Plaintiffs have demonstrated standing to challenge two interrelated failures in the 2015 Rule: the adoption of the Waste Treatment System Exclusion, and the Agencies' refusal to comply with mandatory public participation requirements before doing so. The blanket exclusion of Waste Treatment Systems created in "waters of the United States" in 2015 was a final agency action, as discussed in Section II, below. The only open questions are the timing, locations, and extent of the harm that the expanded exclusion will enable.

A. Plaintiffs Have Identified An "Injury In Fact" That Satisfies The Requirements For Standing.

To show standing, harm must be "imminent," meaning that it must be more than merely "conjectural" or "hypothetical" or otherwise speculative. *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). While this lawsuit involves a facial challenge to the Agencies' adoption of the expanded Waste Treatment System Exclusion in their 2015 Rule, rather than a direct challenge to any particular discharge permit, Plaintiffs submitted member declarations identifying two particular industrial sites where the expanded exclusion has been or will be used to destroy "waters of the United States" and use them as "waste treatment systems." Decl. of Myron Angstman, Dkt. 67-3 at ¶¶6-19; Decl. of James DeWitt, Dkt. 67-6 at ¶¶13-17. Contrary to the Agencies' argument, these allegations of harm are not merely "generalized grievances and speculation." Dkt. 79 at 10. Rather, they involve particularized proposals for industrial "waste treatment system" located in jurisdictional

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"waters of the United States," where published proposals show that the waters thus used have been or will be excluded from basic Clean Water Act protections.

Sierra Club member Myron Angstman describes an application of the expanded exclusion at the proposed Donlin Gold Mine Project, upstream from his home in Bethel, Alaska:

> [T]he mine plan involves impounding portions of American Creek and Lewis Gulch, both tributaries of Crooked Creek, and using them to form a large pit lake and two contact water impoundments. . . . to hold liquid waste that runs off from industrial operations within the Donlin Gold Mine Project site, and allow this effluent to settle or be treated before it is discharged into waters outside of the Project area, so that the mine operator can avoid violating water quality standards *outside* of the Project's designated boundaries.

Dkt. 67-3 at ¶ 13 (emphasis in original). Mr. Angstman notes that "[t]hese impoundments are thus integral to the mine plan," meaning that the expanded Exclusion is being applied to natural "waters of the United States" *inside* the project area in order to prevent water that is too polluted to meet water quality standards from being discharged *outside* of the project area. *Id.* And while Mr. Angstman also predicts that this "waste treatment system" ultimately will fail to protect water quality outside the project area, that risk of failure is a secondary – though highly relevant – harm. *Contra* Dkt. 79 at 11; Dkt. 72 at 13. The primary harms stem from the proposal to strip American Creek and Lewis Gulch of Clean Water Act protections and convert them to a "pit lake and two contact water impoundments" that will be filled with polluted runoff from the mine. Dkt. 67-3 at ¶ 13. This harms Mr. Angstman's interests in preserving good water quality in Crooked Creek, a tributary to the Kuskokwim River, to which he has a close personal connection and values for its salmon-spawning habitat and natural beauty, and which he uses and enjoys and intends to continue doing so in the future. Dkt. 67-3, ¶¶ 3-4, 6-10. Plaintiff Sierra Club thus has standing to defend Mr. Angstman's recreational and aesthetic interests in the Kuskokwim River, Crooked Creek, and their tributaries.

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Idaho Conservation League member James DeWitt's declaration describes the destruction and use of Pinyon Creek as part of a "waste treatment system" under EPA's permit for the Hecla Grouse Creek Mine in Idaho:

> This site includes a large pile of mine tailings and overburden that generates effluent containing high concentrations of cadmium, copper, lead, mercury, zinc, sediment, and acidity. The effluent is collected in a settling pond located at the base of the tailings/overburden pile, then discharged from the settling pond into Pinyon Creek. It then flows through Pinyon Creek and into Jordan Creek.

Dkt. 67-6 ¶ 14. The Agencies acknowledge that the permit for this operation imposes water quality-based effluent limitations "where Pinyon Creek flows into Jordan Creek," *see* Dkt. 79 at 12, but *does not* claim that the permit applies Clean Water Act protections at the point where the tailings pile discharges pollutants into the settling pond formed by an impoundment in Pinyon Creek, *nor* to the segment of Pinyon Creek flowing between the settling pond and Jordan Creek. *Id*. The Agencies contend that Mr. DeWitt "does not show any possibility of being injured," *id*., yet this claim disregards his express objection to fact that portions of Pinyon Creek itself have been excluded from water quality-based protections in a final Clean Water Act permit in order to facilitate pollution-generating activities at the site. Dkt. 67-6, ¶ 14.[1] The exploratory Project is located on tributaries to the Salmon River in parts of the watershed upstream from where Mr. DeWitt frequently uses and enjoys waters and nearby bird-watching sites for recreation and aesthetic enjoyment and plans to continue doing so in the future. *See* Dkt. 67-6 at ¶¶ 8-9, 13.[2]

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[1] *See also* Interv. Opp. and Cross-Mot., Dkt. 72 at 15 and Dkt. 73-13 at 31, suggesting that Pinyon Creek was "dewatered" to facilitate its use as a "waste treatment system."

[2] Mr. DeWitt also identifies the Stibnite Gold Project in Idaho, the proposal for which "involves using some... natural streams to convey and treat waste." Dkt. 67-6 at ¶ 13. Intervenor-Defendants have submitted a declaration from the General Counsel for the project proponent claiming that the mine would not rely on the expanded Waste Treatment System Exclusion. Dkt.

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Notably, the Agencies do not attempt to deny outright that the proposed activities described in these declarations rely on application of the expanded Waste Treatment System Exclusion. Instead they argue that Plaintiffs' only possess a "subjective belief" that the exclusion applies or will apply. But the Clean Water Act itself forbids discharges of pollutants into jurisdictional "waters of the United States," absent a discharge permit that complies with applicable water quality standards. *See* Mot. S.J. at 1-2, discussing 33 U.S.C. §§ 1311, 1342, 1344. The Agencies make no attempt to explain how, for example, an applicant could be allowed to use American Creek and Lewis Gulch to form a "pit lake and two contact water impoundments… to hold liquid waste" from the Donlin Gold Mind Project *absent* an exemption from water quality standards under the expanded Waste Treatment System Exclusion.

The Agencies and Intervenors also argue that Plaintiffs' examples of harm are not yet sufficiently certain or imminent to meet standing requirements to the extent they are in the proposal stage. *See* Dkt. 74 at 11; Dkt. 72 at 14. As an initial matter, permitting agencies typically do not announce their reliance on the expanded Waste Treatment System Exclusion or track its application. Instead, as reflected in the Ohio Valley Environmental Coalition litigation, members of the public usually learn about it when they find that a permit involves discharges into "waters of the United States" that do not meet water quality standards and could not be allowed absent the expanded Waste Treatment System Exclusion. In that case the "Corps did not 'adopt[] and rely[]' upon the EPA interpretation of 'waste treatment system' until... a full year after the [Corps] permit was issued and a month after Plaintiffs filed their motion for partial

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74 at ¶ 15; Dkt. 81 81-1. But the same published "Plan of Restoration and Operations" shows that portions of Fiddle Creek and Meadow Creek would be used as settling ponds or channels for conveying polluted runoff away from mining operations. *See* Decl. of Jennifer C. Chavez, Ex. A; see also Dkt 67-6 at ¶ 13 (describing "the proposal for this project.")

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summary judgment." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, No. CIV.A.3:05-0784, 2007 WL 2200686, at *6 (S.D.W. Va. June 13, 2007), *rev'd sub nom. Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). The absence of explicit language invoking the exclusion is not determinative.

Furthermore, Plaintiffs' examples come from their review of official published proposals, mine plans, and analyses. This is entirely unlike the situation in *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009), where the court found it was "impossible to tell which projects are (in respondents' view) unlawfully subject to the regulations." Far from speculative, Mr. Angstman's concerns stem from mine plans analyzed in the Corps' "Final Environmental Impact Statement for the [Donlin Gold Mine] Project." Dkt. 67-3 at ¶ 10. *See also* Dkt. 67-4 at ¶ 11 (discussing Sierra Club's submission of public comments on the Final Environmental Impact Statement). Mr. DeWitt's concerns arise from a "Plan of Restoration and Operations" that the Forest Service has "determined… to be administratively complete," as noted in the declaration submitted by Intervenor-Defendants. Dkt. 74 at ¶¶ 3-4. Given that the projects are sufficiently well developed to be the subject of public notice and permitting review by various federal and state agencies, they are sufficiently certain to support Plaintiffs' standing to challenge the expanded Waste Treatment System Exclusion.

Plaintiffs have also submitted organizational declarations describing how both the substantive and procedural failures in the 2015 Rule harm the Plaintiff groups' ability to achieve their organizational missions. These too demonstrate a high degree of certainty, including the organizations' separate efforts to resist application of the expanded exclusion on particular industrial sites (Decl. of Dalal Aboulhosn, Dkt. 67-4 at ¶¶ 9-13; Decl. of Austin Walkins, Dkt. 67-7 at ¶¶ 14), as well as procedural harm from lack of notice and comment on the 2015 Rule

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Seattle, WA 98104
(206) 343-7340

adopting the expanded exclusion. (Decl. of Aboulhosn at ¶ 14; Decl. of Walkins at ¶ 14; Decl. of Chris Wilke, Dkt. 67-5 at ¶ 18).

B. Plaintiffs' Injuries Are Fairly Traceable To The Agencies' Actions And Omissions In Their 2015 Rule.

The Agencies attempt to limit the standing analysis in this case to certain "ministerial tweaks" adopted in the 2015 Rule. Dkt. 79 at 12. As discussed above in Section I, those modifications were only one part of the Agencies' final action permanently codifying the expanded Waste Treatment System Exclusion for the first time ever in their 2015 Rule. Plaintiffs' harms are therefore traceable to that action.

The Agencies' adoption of an unlawfully-broad Waste Treatment System Exclusion in 2015 stems at least in part from their refusal to provide for full public notice and opportunity for comment. At a minimum, one possible outcome of a full notice-and-comment rulemaking in 2015 was a decision by the Agencies to recognize that the Clean Water Act prohibits their expanded interpretation of the Waste Treatment System Exclusion. By refusing to put the question to a full airing through public notice and comment, the Agencies deprived Plaintiffs of the opportunity to press the Agencies to conclude that the original narrow interpretation is compelled by the statute. The deprivation of that opportunity is a procedural harm that is traceable to the procedural defect in the 2015 Rule.

The Agencies also argue that the Plaintiffs' harms are not traceable to the 2015 Rule because it was preliminarily enjoined in Alaska and Idaho. Dkt. 79 at 12. This argument demands that the Court make an unwarranted assumption: that even if the Agencies had adopted the narrow interpretation of the Waste Treatment System Exclusion in 2015 based on a finding that such interpretation is *compelled* by the Clean Water Act, a preliminary injunction nonetheless would have compelled the Agencies to continue permitting new waste treatment

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Seattle, WA 98104
(206) 343-7340

systems to be constructed in "waters of the United States." On the contrary, the Agencies have never claimed that the expanded interpretation of the exclusion is compelled by the Clean Water Act. The Agencies have always retained discretion to prohibit discharges into *all* impoundments of "waters of the United States," including waste treatment systems, absent a permit ensuring compliance with water quality standards. 33 U.S.C. §§ 1311(a), 1342. In short, even given a preliminary injunction, Plaintiffs would be better off today had they had the opportunity to engage in a full notice and comment rulemaking on the Waste Treatment System Exclusion. The present harm to Plaintiffs' interests is therefore traceable to their adoption of the expanded exclusion without that opportunity.[3]

IV. EQUITABLE RELIEF IS NECESSARY TO PREVENT IRREPARABLE HARM, AND WELL WITHIN THE COURT'S AUTHORITY.

The Agencies' arguments only affirm that a vacatur of their 2015 action on the Waste Treatment System Exclusion would not provide an adequate remedy because they would simply rely on EPA's 1980 un-promulgated "suspension," while claiming merely to be "[c]ontinuing current practice." *See* Dkt. 79 at 6, 14; 80 Fed. Reg. at 37,073, 37,097. Indeed, the Agencies argue that vacatur will not restore their obligation to provide a full public participation process before codifying the expanded exclusion, and will only restore the "regulatory regime in place" prior to 2015. Dkt. 79 at 14. Under that regime, the Agencies had for decades flouted EPA's promise in 1980 to "carefully re-examine[]" the exclusion and "promptly to develop a revised

[3] The Agencies mistakenly claim Plaintiffs have not demonstrated standing based on procedural harms. Dkt. 79 at 14, n. 4. Although the standing section of their motion refers generally to the "Waste Treatment System Exclusion," their motion makes clear that the denial of adequate public process contributed directly to the substantive outcome. Dkt. 67 at 9-10, and their declarations make the same connection. *See* Decl. of Aboulhosn at ¶ 14; Decl. of Walkins at ¶ 14; Decl. of Chris Wilke, Dkt. 67-5 at ¶ 18 (discussing the need for notice and comment to address the procedural harm.)

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Seattle, WA 98104
(206) 343-7340

definition and to publish it as a proposed rule for public comment." 45 Fed. Reg. at 48,620.

As noted above, the Agencies' adoption of an unlawfully-broad exclusion in 2015 stems at least in part from their refusal to provide notice and opportunity for comment. It is therefore both fitting and proportionate to enjoin them from applying the expanded exclusion to new waste treatment systems unless and until they comply with the legally required public process.

An injunction would not "direct EPA to take any specific action on waste treatment systems," or any action at all. *Contra* Dkt. 79 at 13. The Agencies would remain free to continue applying the exclusion to manmade bodies of water created outside of jurisdictional waters, consistent with the only lawfully-promulgated version of the exclusion. 45 Fed. Reg. at 33,424 (May 19, 1980). They could restore the limiting language temporarily "suspended" in 1980, or explain in a rulemaking how a different version of the exclusion is permitted by the Clean Water Act. An injunction would leave the Agencies a variety of choices, including no-action.

Finally, the Agencies assert without basis that the Administrative Procedure Act "limit[s]" the Court's authority to "'hold[ing] unlawful and set[ting] aside' an action found to be arbitrary and capricious," Dkt. 79 at 13-14. This argument confuses what is required with what is permitted. The Administrative Procedure Act *requires* vacatur of an unlawful or arbitrary and capricious agency action, but nothing in that law *limits* the Court's inherent authority to grant equitable relief. 5 U.S.C. § 706.

CONCLUSION

Plaintiffs respectfully request that this Court grant their motion for summary judgment, along with the declaratory and injunctive relief requested in their Motion, Dkt. 67 at 16-17.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Respectfully submitted this 14th day of June, 2019.

s/ Jennifer Chavez
Jennifer Chavez
(*Admitted Pro Hac Vice*)
Anna Sewell, WSB # 48736
EARTHJUSTICE
1625 Massachusetts Avenue, NW, Suite 702
Washington, D.C. 20036
(202)667-5233
asewell@earthjustice.org

Janette K. Brimmer, WSBA # 41271
EARTHJUSTICE
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
jbrimmer@earthjustice.org

Counsel for Puget Soundkeeper Alliance, Sierra Club, and Idaho Conservation League

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants:

1. Plaintiffs' Combined Reply in Support of Motion for Summary Judgment and Response to Cross-Motion
2. Declaration of Jennifer Chavez in Support of Plaintiffs' Combined Reply in Support of Motion for Summary Judgment and Response to Cross-Motion
3. Exhibit A
4. Exhibit B

/s/ Jennifer Chavez
Jennifer Chavez

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340